IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 972 OF 1998

1. Ganpati Sitaram Satpute
2. Bhupal Sitaram Satpute
3. Vishwas Sitaram Satpute ..Appellants

versus

1. Shri Dattaram Sitaram Satpute
2. Shri Tulsiram Sitaram Satpute
3. Shri Kashinath Sitaram Satpute ..Respondents

Mr. S. G. Deshmukh for the Appellants.

Mr. N. J. Patil for the Respondents.

CORAM : D. G. DESHPANDE,J.

DATE : 20TH APRIL,2005

ORAL JUDGMENT :

1. Heard Counsel for the Appellants and the Respondents.

2. This Appeal is filed by the original applicants who have filed an application for grant of Letters of Administration along with copy of the Will. That application was dismissed or rejected, and hence this Appeal.

3. Counsel for the appellants made only two submissions, firstly, according to him the court rejected the application because according to the court if in the partition dated 22.11.1957 only limited right was granted to the deceased Janabai then she was not competent and capable of making Will even in respect of her share. This conclusion of the court is obviously wrong because after 1956 limited interest of a Hindu female in property was converted into an absolute owner, there should have been no findings on this aspect of the matter of the trial court but in any case the finding is liable to be quashed and set aside.

4. Secondly, trial court found that the prepounder of the Will i.e. present applicants have not succeeded in removing or dispelling the suspicion. Even this finding of the lower court is not consistent with the evidence that has been brought on record. Firstly, the Will was a registered Will. Secondly, it was in respect of the share of the property which came to the husband’s lot in the aforesaid partition and of which Janabai became absolute owner. Thirdly, the attesting witness, the scribe and the doctor were examined by the applicants to prove due execution and attestation, and, lastly, this specific defence or objection of the respondents are the factors that do

not support the ultimate conclusion of the trial court.

5. The present respondents filed a written statement to the application that was filed by the appellants. In paragraph 5 of the said written statement they have dealt with the Will and has raised the following contentions:

> **"According to the defendants the so-called Will of Janabai dated 17.7.1990 is brought about by practising fraud or desception upon her. In doing so applicant took advantage of her old age which was about 90 years and also disadvantage of the fact that since one month before her death she was confined to bed and she was incapable of understanding that she was doing and what not and she was taken to the hospital to see her grand son and then in this manner by practising fraud the Will was obtained."**

It is pertinent to note that the respondents have not challenged the thumb impression of deceased Janabai on the Will. No dispute is tried to be raised in the written statement in that regard.

6. Counsel for the respondents drew my attention to the evidence of the doctor who was

examined by the applicants for proving the mental state of affairs of deceased Janabai. Doctor Nandkumar Dattatray Badbade P.W 3 has stated on oath that he was knowing Janabai and her family as he was their family doctor. Janabai came to him on the morning and told him that she wanted to make a Will and she wanted a certificate about her physical and mental fitness. Doctor stated that he examined her, found her to be mentally and physically fit and he gave her a certificate vide Exhibit 61. Thereafter this witness Dr. Badbade was cross examined. He stated that Janabai was 80 years of age. He denied that since 4-5 years before her death she had become completely and totally weak. There is no other suggestion to the witness.

7. Great emphasis was led by counsel for the respondents on the last sentence of the witness, which is as under:

> *"It is not true that she was the physically and mentally fit."*

He also drew my attention to the original deposition of the witness and contended that this is not a typing mistake because in the original deposition doctor has stated that *"It is not true that she was mentally and physically fit."* Counsel for the

respondents vehemently urged that if the doctor admits that she was not mentally and physically fit, then the whole case of the applicants was rightly rejected by the court.

8. It is difficult to accept this contention. It is true that in the original deposition the statement of the doctor recorded is with the suggestion that she was mentally and physically fit was not true. There are so many reasons why this has to be taken as a mistake on the part of the Judge recording evidence. Firstly, if the doctor wanted to admit that Janabai was not mentally and physically fit then he would not have given the certificate Exhibit 61. Secondly, in his examination in chief he would not have asserted that she was mentally and physically fit. Thirdly, if the doctor had really contradicted his certificate and evidence given in examination in chief then the lawyer of the Applicants would have certainly further cross examined him to seek clarification. Fourthly, doctor was a family doctor, knowing all the members of the family and Janabai for last 20 years and in the certificate Exhibit 61 he has stated as under, which is forming part of the Will itself:

> *"That Smt. Janabai Satpute of Miraj is my patient since 1986. Today I examined her.*

> *Her mental and physical condition is fit, sound and normal. I asked her in respect of Will and she told me the contents of the Will briefly. I feel that she has taken her decision voluntarily."*

Further if the Medical Practitioner gives certificate of the aforesaid nature in writing on the Will itself and if in Court he gives the contradictory deposition then it is a very serious matter and the court could have taken action against him. Nowhere in the judgment even the trial court has taken this question as an admission by the doctor in the manner in which counsel for the respondents wants to interpret it.

9. Therefore, the submissions made by counsel for the respondents that the Doctor had nullified the case of the applicants, is without any basis. The background and the manner in which the doctor gave evidence, it is clear that his last statement or sentence has not been properly reproduced by the judge. In any case it has to be treated as a typing mistake.

10. The applicants examined the scribe and attesting witness and from their evidence and particularly the cross examination, it is absolutely clear that the applicants successfully proved and

properly proved due attestation and execution of the document by Smt. Janabai and attesting witnesses. The Will is a registered document and she had gone from Miraj to Sangli to register the Will.

11. Counsel for the respondent drew my attention to the Judgment of Supreme Court reported in **2002 (6) Bom. C.R. 522 Madhukar D. Shende vs. Tarabai Aba Shedage** wherein Supreme Court in paragraph 9 has stated that:

> **"It is well settled that one who propunds a Will must establish the competence of the testator to make the Will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. The contestant opposing the Will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same. The factors, such as the Will being a natural one or being registered or executed in such**

> **circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a Will, the Court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition."**

If this reasoning of the Supreme Court is applied to the present case, then it has to be held that firstly the Will is a natural Will. Beneficiaries are not strangers to the Will, the Will is to the extent of Janabai's share in the property. Will is a registered one and Janabai has gone from Miraj to Sangli to execute the Will. Before doing that she obtained certificate of doctor about the physical and mental fitness. Scribe and the attesting witness of the Will have been examined. No motives have been proved for the scribe and the attesting witness to depose falsely and support the Will, the cross examination of this witness is of no effect at all.

12. It was next contended by Mr. Patil that in the partition deed dated 22.11.1957 Janabai was granted only a limited right only and it was further provided that after her death the property will pass

on to other legal heirs and therefore she was incompetent to make the Will even in respect of her share in the property. Mr. Patil relied upon a judgment of the Supreme Court reported in **1994 Mh.L.J. 1025 Gumpha (Smt.) and others vs. Jaibai.** In that case the last Will holder had two wives. He executed Will of his property in 1941 giving one half share to each of his wife till they are alive and the respondent the only daughter was to be the ultimate beneficiary. The testator died in 1958. One of his wife step mother of the respondent died in 1966 but few months before her death she executed a Will in favour of the defendant - appellant, a complete stranger to the family allegedly her domestic servant. Question before the Supreme Court was that it is a life estate of a widow under a will executed in 1941 gets enlarged into an absolute estate under section 14(1) of the Hindu Succession Act, if the succession open after the death of the testator in 1958. In other words according to the respondent the Will was invalid as the mother had right of maintenance only and she had no right or title which she could voluntarily transfer in favour of the appellant. The Supreme court after considering all the relevant provisions and the explanation to section 14 held that :

"**Held, that the language of section 30 of**

the Hindu Succession Act is clear and explicit and it creates absolute power in a Hindu to dispose his property by will. The section does not impose any restriction, express or implied, except that he should be capable of disposing of such property. If maintenance was given in recognition of pre-exising right, then such acquisition of property was taken out of the purview of section 14(2) to promote the objective of section 14. However, if any property is acquired by a female hindu as provided in Section 14(2) then it would be beyond the purview of section 14(1) of the Act. Reason for it was that the legislature never intended to confer larger estate on females than on males. Acquisition of property under a will is not mentioned in section 14(1) but falls under sub section (2). A reading of the two sub-sections of section 14 together indicates that even though the law was revolutionised and a female Hindu was made an absolute owner in respect of any property acquired by her either before or after the date of enforcement of the Hindu Succession Act yet the law did not intend to confer a higher and better right than what was enjoyed by a male Hindu. Thus, if a

female Hindu acquires possession after the enforcement of the Hindu Succession Act and that possession was traceable to an instrument or a document described in section 14(2) of the Act, then she could not get higher right than what is stipulated in the document itself. Appeal dismissed. (1977) 3 SCC 99, AIR 1978 SC 1051, AIR 1987 SC 353, Rel. (1991) 3 SCC 410, 1962 (Supp.) 3 SCR 418, 1979(3) SCC 300 and 1991(4) SCC 312."

Mr. Patil therefore contended that Janabai got a limited right under the partition because it was mentioned in the partition as to what was the property that was given to share of father Seetaram and after that Janabai was to enjoy use of that till her life and after that the property was to go to other sons. Respondent Nos. 2 to 7 of the partition deed. Partition deed is dated 22.11.1957.

13. At this juncture, it has to be borne in mind that this appeal is filed by the original applicants for grant of Letters of Administration along with the copy of the Will of Janabai because according to them Janabai had made a Will in respect of the property by the aforesaid Will dated 17.7.1990 and

the property was in possession of Janabai at that time. As per the evidence of this witness applicant No.1 Bhupal who is appellant no. 2 before the court, Father Sitaram died in the year 1974. He has done partition of his property in the year 1957 and no share was given to the mother at the time of affecting partition. Obviously the document of partition does not show that anything was given to Janabai at the time of partition. Therefore question is whether the aforesaid judgment of the Supreme Court will help the respondent in upholding the order in their favour.

14. Counsel for the appellant Mr. Deshmukh contended that Hindu Law came to be codified in 1956 and so far as partition is concerned, it still holds good in the field. According to him that is as per Article 315 of the Mullas Hindu Law Eighteenth Edition published by Butterworths a wife cannot demand partition but if a partition does take place between her husband and his sons, she is entitled (except in Southern India) to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband. He also relied upon a case rightly reported in Article 315 where at the partition between the father and his three sons, she was not allotted a share, it was held that she was entitled to entitled to reopen the partition,

there being no waiver merely by her not asking for a share ...."

15. Mr Deshmukh therefore contended that firstly the judgment of the Supreme Court does not come in the way of the applicant because that was the case based on a Will made by the owner of the property during his life time. Whereas in the instant case Sitaram has effected partition of a property during his life time. Secondly, Mr. Deshmukh contended that if under the provisions of Hindu law then prevailing regarding partition the wife was entitled to equal share in the property then not giving her share in the partition of 1957 would not affect her right to an equal share i.e. equal to share of the sons and therefore in any case the will for which letters of administration were sought could not be affected at all.

16. In this case partition is of 1957. Sitaram father died in 1974. Janabai died thereafter. If therefore the property was partitioned in 1957 then Janabai was entitled to equal share in the property as that of her son and if Sitaram died without making any Will then in that property of Sitaram or in the property reserved by Sitaram for himself, Janabai would have a share. The Judgment of the Supreme Court relied upon Mr. Patil being on the

basis of the Will of the owner - testator, in view of these specific legal provision will not apply to the facts of the case. The position therefore becomes clear that so far as Will is concerned, it is properly proved and so far as the legal position is concerned, Janabai had 1/7th share in the property at the time of partition and after the death of Sitaram she would get share in that property also under the provisions of Hindu Succession Act. Admittedly, in the partition of 1957, Janabai was not given any share and if that is so then the Will so executed by her in respect of this property cannot be faulted with. The trial court did not took into consideration this important aspects of the matter, came to a wrong conclusion and therefore that order of dismissal of application has to be set aside. Hence, order :

ORDER

. Appeal is allowed.

. Order passed by the Civil Judge Senior Division, Sangli dated 10.2.1998 dismissing the application of the appellant for grant of Letters of Administration with the copy of the Will stands allowed, as prayed by the Appellants. No order as to costs.

20.04.2005 (D.G. DESHPANDE, J.)